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# INTERPRETING THE FEDERAL RULES OF EVIDENCE: THE USE AND ABUSE OF THE ADVISORY COMMITTEE NOTES

Eileen A. Scallen\*

## I. INTRODUCTION

The Federal Rules of Evidence (Rules) are just two decades old.<sup>1</sup> The Rules were drafted with the goal of promoting predictability and uniformity in the admission of evidence in the federal courts.<sup>2</sup> At the same time, the drafters wished to leave some flexibility and discretion in the administration of the Rules, rejecting the possibility that they could draft a code that anticipated every possible evidence problem that might arise.<sup>3</sup>

The by-product of codification, however, is the problem of interpretation. The United States Supreme Court<sup>4</sup> and several commentators<sup>5</sup> have struggled recently with the following question: How do we

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1. President Ford signed the legislation enacting the Federal Rules of Evidence on January 3, 1975. Statement on Signing a Bill Establishing Rules of Evidence in Federal Court Proceedings, 1 *PUB. PAPERS* 6 (Jan. 3, 1975). For a more detailed description of the making of the Rules, see *infra* notes 38-56 and accompanying text.

2. Statement on Signing a Bill Establishing Rules of Evidence in Federal Court Proceedings, *supra* note 1, at 6.

3. See Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 *NEB. L. REV.* 908, 908 (1978) (“[T]he answers to all questions that may arise under the Rules may not be found in specific terms in the Rules.”); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 *IOWA L. REV.* 413, 458 (1989) (“The [drafters] did not believe there can be ideal evidence rules that trial courts can apply mechanically.”); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning and the Law of Evidence*, 44 *AM. U. L. REV.* (forthcoming May 1995) (“[D]rafting fine-tuned rules of evidence to deal with every case was impossible.” (quoting Edmund M. Morgan, *Forward to MODEL CODE OF EVIDENCE* 1, 7 1942)).

4. See, e.g., *Tome v. United States*, 115 S. Ct. 696 (1995); *Williamson v. United States*, 114 S. Ct. 2431 (1994); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993); *United States v. Salerno*, 112 S. Ct. 2503 (1992); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988); *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Owens*, 484 U.S. 554 (1988); *Bourjaily v. United States*, 483 U.S. 171 (1987).

5. See, e.g., Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 *GEO. WASH. L. REV.* 857 (1992); Edward J. Imwinkelried, *A Brief Defense of the*

determine what the Rules mean when applying them to concrete cases? While I have addressed that question in a comprehensive manner elsewhere,<sup>6</sup> this Essay focuses on an essential piece of the puzzle—the role of the Advisory Committee Notes in interpreting the Federal Rules of Evidence.<sup>7</sup> Although other articles explore the virtues and vices of traditional legislative history,<sup>8</sup> scholars have paid insufficient attention to the unique status and value of the Advisory Committee Notes. This void was highlighted recently by Justice Kennedy's and Justice Scalia's clashing views in *Tome v. United States*<sup>9</sup> on the utility of the Advisory Committee Notes.<sup>10</sup>

This Essay explains the objections to the use of traditional types of legislative history in interpreting legal texts.<sup>11</sup> It then argues that these vices, assuming they exist, do not apply to the Advisory Committee Notes.<sup>12</sup> This Essay concludes by illustrating these points with the *Tome* opinions, arguing that Justice Kennedy uses the Notes well—respecting them rather than deferring to them—while Justice Scalia unfairly heaps abuse on this approach.<sup>13</sup>

## II. THE TROUBLE WITH LEGISLATIVE HISTORY

No one has more consistently opposed the use of legislative history in determining the meaning of legal texts than Justice Antonin

*Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990); Scallen, *supra* note 3; Andrew E. Taslitz, *Daubert's Guide to the Federal Rules of Evidence: A Not-So-Plain Meaning Jurisprudence*, 32 HARV. J. ON LEGIS. 3 (1995); Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. (forthcoming 1995); Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393 (1994); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992).

6. Scallen, *supra* note 3.

7. Although this Symposium focuses on the Federal Rules of Evidence, my remarks regarding the Advisory Committee Notes also apply to the use of the Advisory Committees' Notes on the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure.

8. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371.

9. 115 S. Ct. 696 (1995).

10. Compare *id.* at 698, 702-04 (Kennedy, J., delivering majority opinion) (describing Notes as useful guide in interpreting Rules) with *id.* at 706 (Scalia, J., concurring in part and concurring in judgment) (describing Notes as persuasive but not authoritative).

11. See *infra* part II.

12. See *infra* part III.

13. See *infra* part IV.

Scalia.<sup>14</sup> In his written works and speeches before joining the Court,<sup>15</sup> as well as in his opinions since joining the Court, Justice Scalia has raised numerous objections to the use of legislative history. He has argued that courts have been too willing to consult legislative history when a dispute could have been resolved simply on the basis of the statute's text.<sup>16</sup> In addition, he has ridiculed the idea that legislative history is evidence of the "intent" or the "purpose" of Congress.<sup>17</sup> He has consistently stressed that legislators are often largely ignorant of the content of legislative history.<sup>18</sup> A typical example is his critique of Justice Stevens's efforts to set out the legislative history behind Rule 609, dealing with impeachment by prior convictions:

I find no reason to believe that any more than a handful of the Members of Congress who enacted Rule 609 were aware of its interesting evolution from the 1942 Model Code; or that any more than a handful of them (if any) voted, with respect to their understanding of the word "defendant" and the relationship between Rule 609 and Rule 403, on the basis of the referenced statements in the Subcommittee, Committee, or Conference Committee Reports or floor debates—statements so marginally relevant, to such minute details, in such relatively inconsequential legislation.<sup>19</sup>

If the legislators are not making and reading legislative history, as Justice Scalia contends, who is? To answer this question, Justice Scalia resorts to a type of public choice critique.<sup>20</sup> Public choice theory, which applies the methodology of economics to public policy decision making, suggests that legislation is more likely to be the product of

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14. Several other Reagan appointees to the court of appeals have expressed similar objections. See Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 443 (1988).

15. See Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 254 & n.57 (1992) (discussing speech delivered by then-Judge Scalia at law schools around country criticizing use of legislative history in statutory interpretation).

16. Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 161.

17. *Id.* at 162-64.

18. *Id.* at 163.

It is to be assumed—by a sort of suspension of disbelief—that two-thirds of the Members of both Houses of Congress (or a majority plus the President) were aware of [the legislative history] and must have agreed with [it]; or perhaps it is to be assumed—by a sort of suspension of the Constitution—that Congress delegated . . . the authority to say what its laws mean.

Conroy v. Aniskoff, 113 S. Ct. 1562, 1568 n.2 (1993) (Scalia, J., concurring).

19. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

20. See Frickey, *supra* note 15, at 252-55.

control of the legislative agenda or of strategic voting than the product of deliberation by the legislature as a whole.<sup>21</sup> From this perspective legislative history is meaningless as a guide to legislative intent or purpose as it most likely was manufactured by legislative committee staff members under the influence of special interest groups.<sup>22</sup>

Justice Scalia's opposition to the use of legislative history is grounded in his view of the roles of the Court and Congress under the Constitution.<sup>23</sup> In his view, the Court's role is to interpret properly enacted statutes.<sup>24</sup> Legislative history is not part of the duly enacted statute; thus, legislative history has no authority.<sup>25</sup> Congress may not subvert the law-making process by filling up volumes with legislative history manufactured by unelected committee staff members and lobbyists, effectively altering the application of the statute.<sup>26</sup> Justice Scalia's argument is premised, however, on a faulty assumption—that the Court can perform its role of construing a statute by using *only* the language of the statute. I have extensively critiqued this textualist or “plain meaning approach” elsewhere,<sup>27</sup> but it is enough to suggest here that it might be less constitutionally objectionable to look to the materials created by committee staff members, who are the agents of the legislators—even if these agents rely on information from interested sources—than to look to materials not intended to have any legal force whatsoever. I am, of course, referring to the textualists' favorite “authority”—the dictionary.<sup>28</sup>

21. See *id.* at 252-53.

22. See *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in judgment). Professors Farber and Frickey link Justice Scalia's view of the legislative process to the assumptions of public choice theory. Farber & Frickey, *supra* note 14, at 437.

23. Stock, *supra* note 16, at 165-67.

24. *Id.* at 167.

25. *Id.* at 166.

26. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1076-79 (1989); Stock, *supra* note 16, at 165.

27. See Scallen, *supra* note 3.

28. See, e.g., *United States v. Salerno*, 112 S. Ct. 2503 (1992). I, for one, have never voted to elect the authors of *Webster's Third New International Dictionary*, nor the authors of any other dictionary, to Congress. However, *Webster's Third New International Dictionary* seems to be the Supreme Court's dictionary of choice. See Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 n.12, 1445 (1994); see also A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994) (arguing meanings of words used do not equal meaning of statute); Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1565-66 (1994) (reviewing LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993)) (explaining several problems with relying on “ordinary”—dictionary—meaning for evidence of “plain meaning” of legal text).

Justice Scalia's cynicism about legislative history has been challenged. Professors Farber and Frickey suggest that Justice Scalia and his followers have overstated the degree to which legislators are ignorant of the content of legislative history.<sup>29</sup> Professors Farber and Frickey cite research suggesting that "legislators outside the committee and their staffs focus primarily on the report, not the bill itself."<sup>30</sup> Given the multitude of pressures and demands on a legislator's time, it is not surprising that they would turn to a "secondary" source first in deciding what proposed legislation is all about.<sup>31</sup> Finally, Justice Breyer—formerly a professor of law at Harvard University Law School<sup>32</sup>—has noted that a legislative staff member who creates and reviews these secondary sources does so as the agent of the legislator and views the materials in light of the legislator's goals.<sup>33</sup>

Even assuming that Justice Scalia is correct that reliance on committee reports or other legislative history allows Congress to abdicate its law-making responsibilities, this Essay suggests that his criticism does not have the same force when applied to the Federal Rules of Evidence Advisory Committee and its Notes.<sup>34</sup>

### III. THE SPECIAL QUALITY OF THE ADVISORY COMMITTEE AND ITS NOTES

The basic problem with applying Justice Scalia's critique of general legislative history to the Advisory Committee Notes is that Congress shares the power to make rules of procedure—including evidence rules—with the judiciary under the Rules Enabling Act.<sup>35</sup> Thus, in dealing with the Rules, Justice Scalia takes aim not only at the legislative history produced by Congress, but also at the legislative history produced by the Advisory Committee—an agent of the

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29. Farber & Frickey, *supra* note 14, at 443-46.

30. *Id.* at 445 (citing WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 94 (2d ed. 1984)) (footnote omitted) (noting "[t]he report . . . is the principal official means of communicating a committee decision to the entire chamber").

31. *See id.* at 445 n.79 ("A good report, therefore, does more than explain—it also persuades.") (quoting ERIC REDMAN, THE DANCE OF LEGISLATION 140 (1973)).

32. THE AMERICAN BENCH 19 (Marie T. Finn et al. eds., 7th ed. 1993).

33. Breyer, *supra* note 8, at 858-59.

34. *See infra* part III.

35. 28 U.S.C. § 2072 (1988 & Supp. V 1993). The Rules Enabling Act provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence . . . . Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b) (1988); *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1025 (1982) (noting allocation of rulemaking power to Supreme Court).

Court.<sup>36</sup> In extending the scope of his critique, Justice Scalia has not given sufficient consideration to both the special role of the Advisory Committee in the legislative process and the significance of its published Notes.<sup>37</sup>

The Federal Rules of Evidence Advisory Committee's role is slightly more complicated than roles of other types of procedural rules committees because of the circumstances of the eventual enactment of the Federal Rules of Evidence. The rule-making path usually begins when the appropriate Advisory Committee prepares a draft rule or proposed change to a rule.<sup>38</sup> The committee's reporter "prepares the initial drafts of rules changes and 'Committee Notes' explaining their purpose or intent."<sup>39</sup> The Advisory Committee as a whole reviews the

36. Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 *TEX. TECH L. REV.* 323, 329 (1991) (noting that Chief Justice of United States Supreme Court appoints committee members).

37. This Essay stresses the importance of the published Notes, as opposed to the unpublished or personal views of members of the Advisory Committee. Cf. David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 *U.C. DAVIS L. REV.* 753, 764-69 (1984) (discussing importance of unpublished views of Advisory Committee members). Professor Levine, in analyzing the authority for appointing special masters, argues that courts should consider the unpublished papers, transcripts of meetings, or private statements of the Advisory Committee members "because [these members] served, in effect, as a legislative committee for the drafting of the rules." *Id.* at 768. I cannot go as far as Professor Levine. Unpublished correspondence, drafts, or articles on the rules and comments made during meetings, as a general rule, do not display the same care and consideration of work that is published—deliberately put forth for public consumption. While I might not ignore such material, especially if it had direct bearing on the interpretative problem, unpublished material simply is not as reliable and credible as published material. In short, while unpublished material may have some persuasive value, it is not very strong. Moreover, one must distinguish the collective views of the Advisory Committee from the views of individual members. For example, the Court has cited the views of Professor Cleary, the reporter to the Advisory Committee on Evidence. See *Tome v. United States*, 115 S. Ct. 696, 703 (1995). However, Professor Cleary's views as a single member, albeit important, do not weigh as heavily as the published views of the entire Committee.

38. Baker, *supra* note 36, at 329; see also 28 U.S.C. § 2073(a)(2) (1988) ("The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed . . ."). The Advisory Committees are composed of federal judges, practitioners, and academics appointed by the Chief Justice of United States Supreme Court. Baker, *supra* note 36, at 329; see also 28 U.S.C. § 2073(a)(2) ("Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges."). The Advisory Committees continually monitor the operation of the rules, develop new rules, or change old rules. Baker, *supra* note 36, at 329. There are Advisory Committees for each of the different sets of rules—Civil, Criminal, Bankruptcy, Appellate, and Evidence. *Id.* The Evidence Advisory Committee was discharged, however, following the passage of the Federal Rules. 1 *STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL* 6 (6th ed. 1994). The Evidence Advisory Committee has only recently been reactivated. See *id.*

39. Baker, *supra* note 36, at 329.

draft, revises it, and sends it on to the Standing Committee on Rules of Practice and Procedure (Standing Committee).<sup>40</sup>

The Standing Committee either accepts, rejects, or modifies the proposed rule submitted by the Advisory Committee.<sup>41</sup> If the Standing Committee approves the draft, it transmits the proposed rule and the Advisory Committee Notes to the Judicial Conference.<sup>42</sup> In turn, the Judicial Conference transmits its recommendations to the United States Supreme Court.<sup>43</sup> The Court reviews the rule changes, modifies them if it wishes,<sup>44</sup> and transmits them to Congress through an Order of the Court.<sup>45</sup> Congress then has a period of time to review the rules and either modify or reject them.<sup>46</sup> If Congress does not act on the rules, they go into effect as transmitted by the Court.<sup>47</sup> This basic pattern has been followed since the passage of the Rules Enabling Act, but was amended in 1988 to open the Advisory Committee and Standing Committee meetings to the public,<sup>48</sup> to provide for ex-

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40. *Id.* Technically, this is the "standing committee on rules of practice, procedure, and evidence." 28 U.S.C. § 2073(b).

41. Baker, *supra* note 36, at 330.

42. *Id.* The Judicial Conference of the United States consists of the Chief Justice of the United States Supreme Court, who serves as the Chairperson of the Conference, the chief judges of each circuit court of appeals, the Federal Circuit, and the Court of International Trade, and 12 district court judges. *Id.* at 328.

43. *Id.* at 331.

44. Part of the controversy over the rule-making approach is criticism concerning the degree to which the Court has abdicated its supervisory role over the Standing Committee's and Advisory Committee's work. See *Tome v. United States*, 115 S. Ct. 696, 706 (1995) (Scalia, J., concurring in part and concurring in judgment) (suggesting Supreme Court gives too much authority to its committees); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 676 (1975) (suggesting Supreme Court does not exercise sufficient supervision and control over its committees). However, this criticism appears unwarranted. See Baker, *supra* note 36, at 331 ("The Supreme Court has played an active part, not infrequently refusing to adopt rules proposed to it and making changes in the text of the rules."). The Court recently demonstrated its oversight in withholding its approval of the part of the proposed revision to Federal Rule of Evidence 412, the rape-shield law, which would have applied the Rule to civil cases. COMMUNICATION FROM THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES, TRANSMITTING AN AMENDMENT TO THE FEDERAL RULES OF EVIDENCE AS ADOPTED BY THE COURT, H.R. DOC. NO. 250, 103d Cong., 2d Sess. at v (1994). According to Chief Justice Rehnquist, "[s]ome members of the Court expressed the view that the amendment might exceed the scope of the Court's authority under the Rules Enabling Act . . ." *Id.* Congress, however, reinstated the part of Rule 412 that applied the Rule to civil cases. Fed. R. Evid. Serv. (Law. Co-op) 24 (1995).

45. Baker, *supra* note 36, at 331.

46. See *id.*

47. *Id.*

48. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401(a), 102 Stat. 4642, 4649 (1988) (codified at 28 U.S.C. § 2073(c)(1) (1988)).



tended periods of public comment,<sup>49</sup> and to provide for a longer period of congressional review.<sup>50</sup>

Yet, in the case of the original package of Federal Rules of Evidence, the final step of the process—congressional review—resulted in a significant moment in the federal rule-making process. When the proposed Federal Rules of Evidence went before Congress, the rules on privilege caused significant controversy.<sup>51</sup> As a result, Congress passed a statute prohibiting the Rules from taking effect absent specific legislation.<sup>52</sup> Congress, through its judicial committees, then conducted a thorough review of the Rules, eliminating all of the proposed rules on privilege and modifying several other rules.<sup>53</sup> Members of the Advisory Committee testified before Congress.<sup>54</sup> Only then was the final package of Federal Rules of Evidence formally enacted by Congress<sup>55</sup> and signed by President Gerald Ford.<sup>56</sup>

The result of this unique finale to the original package is that one can find “legislative history” on the Rules in several places: the Advisory Committee Notes, the reports of the Subcommittee on Criminal Justice of the House Judiciary Committee, the House Committee on the Judiciary, the Senate Committee on the Judiciary, and the Conference Report.<sup>57</sup> Professor Edward W. Cleary, the reporter to the Advisory Committee, suggested soon after the adoption of the Rules that the Advisory Committee Notes were intended to support and explain the Rules.<sup>58</sup> He argued that the Notes should be given great weight in interpreting the Rules:

[The Advisory Committee Notes] accompanied the Rules through the successive stages of consideration by the Com-

49. *Id.* § 403(b), 102 Stat. at 4651 (codified at 28 U.S.C. § 332(d)(1) (1988)).

50. *Id.* § 401(a), 102 Stat. at 4649 (codified at 28 U.S.C. § 2074(a) (1988)).

51. There were essentially two objections to the proposed rules on privilege. First, there were objections to the Court’s decisions as to which privileges ought to be recognized. Friedenthal, *supra* note 44, at 683 n.58. Second, there was a general objection that creating privileges transgressed the Court’s power to make rules of procedure under the Rules Enabling Act by trespassing on substantive rights. *Id.* Dean Friedenthal points out objections to other rules, such as Federal Rule of Evidence 804(24), the residual exception to the hearsay rule. *Id.*

52. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9, *repealed by* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 404(a), 102 Stat. 4642, 4651 (1988).

53. 2 JAMES F. BAILEY, III & OSCAR M. TRELLES, II, *THE FEDERAL RULES OF EVIDENCE LEGISLATIVE HISTORY AND RELATED DOCUMENTS* doc. 7, at 74 (1980).

54. *See* Mengler, *supra* note 3, at 430-31.

55. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. app.).

56. 1 SALTZBURG ET AL., *supra* note 38, at xxv.

57. Cleary, *supra* note 3, at 913-14.

58. *Id.* at 913.

mittee on Rules of Practice and Procedure, the Judicial Conference of the United States, and the Supreme Court. The Chief Justice transmitted them to the Congress with the Rules. They were carefully scrutinized by the involved congressional committees and subcommittees, and, except in those instances where superseding changes were made in the Rules by the Congress, must be taken to represent the thinking of that body as the equivalent of a committee report effectively serving as the basis of legislation.<sup>59</sup>

Professor Cleary, in interpreting the Rules, viewed the Notes on rules not modified by Congress as second in importance only to the text of the Rules themselves.<sup>60</sup> Given the prominence of Professor Cleary's role as Reporter to the Advisory Committee, one might discount his insights as the testimony of an interested witness. However, there are several independent reasons to support his views.

The Advisory Committee acts as the highly qualified agent of the judiciary.<sup>61</sup> As noted earlier, it is primarily comprised of members of the federal judiciary, state court judges, practitioners, and academics.<sup>62</sup> These individuals are appointed by the Chief Justice of the United States Supreme Court, who serves as Chair of the Judicial Conference.<sup>63</sup> While the method of and criteria for selecting committee members remains somewhat mysterious, their expertise cannot be questioned.<sup>64</sup> The Advisory Committee is ultimately accountable to the Supreme Court, but interacts most directly with those interested members of the bar and judiciary who comment on proposed rules

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59. *Id.* (footnotes omitted).

60. *See id.*

61. *See supra* note 36 and accompanying text.

62. *See supra* note 38.

63. Baker, *supra* note 36, at 328.

64. The newly reconstituted Advisory Committee on Evidence consists of Judge Ralph K. Winter, Jr. (2d Cir.), chair; Judge Jerry E. Smith (5th Cir.); Judge Fern M. Smith (N.D. Cal.); Judge Milton L. Shador (N.D. Ill.); Judge James T. Turner (Ct. Cl.); Chief Justice Harold G. Clarke (Ga. Sup. Ct.); Professor Kenneth S. Broun (Univ. of N.C. School of Law); Attorney Gregory P. Joseph; Attorney John M. Kobayashi; and Attorney James K. Robinson. *Judicial Conference Advisory Committee on the Rules of Evidence Starts Work*, NEWSLETTER (Ass'n of Am. Law Sch., Sec. on Evid.), May 1993, at 1, 2 (on file with *Loyola of Los Angeles Law Review*). Professor Margaret Berger (Brooklyn Law School) is the reporter to the committee. *Id.* at 1. The original Advisory Committee was just as distinguished. *See* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5006, at 98 & n.27 (1978). While there are some practitioners on the committee, the American Bar Association has made it clear that it would like to see more practitioners on all of the Advisory Committees. *See ABA Seeks Lawyer Input on Rules Drafting, Nixes Mandatory Court-Annexed Arbitration*, 63 U.S.L.W. 2081, 2097 (Aug. 16, 1994).

and the Standing Committee of the Judicial Conference.<sup>65</sup> In its drafting, soliciting comments, and revising, the Advisory Committee acts as a buffer between the highly politicized interests of the general bar and the judiciary responsible for promulgating the rules. Thus, while the Advisory Committee Notes might be roughly analogous to a congressional committee report, the Notes are not produced by unsupervised staff members and lobbyists with specific agendas.

The analogy to committee reports does, however, provide a second reason to value the Notes as a source of interpretative guidance. Judge Richard Posner, who generally agrees with the public choice critique of the legislative process, argues for careful consideration of some legislative history because it often contains the true terms of the legislative bargains or compromises reached:

[S]ince an unknown fraction of all bills represent "deals" struck with or between interest groups, it is not necessarily true that each member of the legislative majority behind a particular bill will have bothered to study the details of the bill he voted for; he may simply have assented to the deal struck by the sponsors of the bill. And unless the terms of the deal are stated accurately in the committee reports and in the floor comments of the sponsors, the sponsors will have difficulty striking deals in the future.<sup>66</sup>

The Advisory Committee receives comments from numerous sources and must balance the competing interests of several constituencies or points of view.<sup>67</sup> Such compromises are more likely to be explained in the Notes than embodied in the Rules themselves because the drafters

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65. See, e.g., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES, Feb. 9, 1995, available in WESTLAW, U.S.-Orders database [hereinafter REPORT OF THE JUDICIAL CONFERENCE] (noting the process followed by Advisory Committee in reviewing proposed Rules 413-415, including notices sent to "all federal judges, about 900 evidence law professors, 40 women's rights organizations, and 1,000 other individuals and interested organizations" in order to solicit comments). See also Baker, *supra* note 36, at 329-31 (summarizing interaction among advisory committees, Standing Committee, and Judicial Conference, including efforts to solicit public comment by notices published in *Federal Register* and by publishing proposed rules in advance sheets of *Supreme Court Reporter*, *Federal Reporter*, and *Federal Supplement*, as well as sending copies to other publishers, chief justices of each state, and other interested individuals).

66. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 269 (1985).

67. See *supra* note 65. See also Charles Alan Wright, *Forward: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 8 (1994) (commenting from first-hand experience that "[t]he [rule-making] process is ordinarily a slow and cautious one, with one or more drafts widely circulated and the subject of public and scholarly comment, and with ample opportunity to rethink matters, to avoid blunders, and to improve drafts").

wanted to keep the Rules flexible, rather than creating a detailed code to cover every problem.<sup>68</sup> The compromises—or “deals”—described in the Notes must be given some real weight to ensure that those constituencies feel their voices have been heard.

#### IV. THE USE AND ABUSE OF THE NOTES IN *TOME V. UNITED STATES*

The United States Supreme Court has not been a model of clarity and consistency in its approach toward the Advisory Committee Notes. It has frequently cited to the Notes,<sup>69</sup> but has fluctuated in its description of the role the Notes play in the interpretation of the evidence rules.<sup>70</sup> The apparent tension over the role of the Notes has been growing among some members of the Court.

Concurring in *Williamson v. United States*,<sup>71</sup> Justice Kennedy urged the Court to give great weight to the Advisory Committee Note in interpreting Federal Rule of Evidence 804(b)(3).<sup>72</sup> Justice Kennedy argued:

When as here the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee Note. We have referred often to those Notes in interpreting the Rules of Evidence, and I see no reason to jettison that well-established practice here.<sup>73</sup>

Thus, Justice Kennedy apparently adopts Professor Cleary's view, that where the text of a Rule does not solve the problem—and it is unlikely that a dispute over the meaning of a rule would reach the Court if the text was that “plain”—and the Advisory Committee Note does

68. See Scallen, *supra* note 3.

69. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 n.9, 2796 (1993); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 516, 522 (1989); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 n.8 (1988); *Huddleston v. United States*, 485 U.S. 681, 688 (1988); *United States v. Owens*, 484 U.S. 554, 562 (1988); *Bourjaily v. United States*, 483 U.S. 171, 179 n.2 (1987); *United States v. Abel*, 469 U.S. 45, 51 (1984).

70. Compare *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 166 (1988) (giving notes great weight) with *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (stating notes should be given no weight) and *Williamson v. United States*, 114 S. Ct. 2431, 2436 (1994) (refusing to decide “exactly how much weight to give the Notes in this particular situation”).

71. 114 S. Ct. 2431.

72. *Id.* at 2442 (Kennedy, J., concurring). Federal Rule of Evidence 804(b)(3) deals with the admissibility of statements against interest. FED. R. EVID. 804(b)(3).

73. *Williamson*, 114 S. Ct. at 2442 (Kennedy, J., concurring) (citations omitted).

indicate how the problem should be solved, then the Note should be given great weight.<sup>74</sup>

The majority opinion in *Williamson*, written by Justice O'Connor, also quotes from the Advisory Committee Note, but concludes that it is more ambiguous than Justice Kennedy suggests:

Without deciding exactly how much weight to give the Notes in this particular situation, compare *Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S.Ct. 2379, 2385, 91 L.Ed.2d 18 (1986) (Notes are to be given some weight), with *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528, 109 S.Ct. 1981, 1994-95, 104 L.Ed.2d 557 (1989) (SCALIA, J., concurring in judgment) (Notes ought to be given no weight), we conclude that the policy expressed in the statutory text points clearly enough in one direction that it outweighs whatever force the Notes may have.<sup>75</sup>

However, the Court's attempt to find the answer in the text of the Rule alone is highly questionable.<sup>76</sup> The goal of the *Williamson* majority seemed to be to resolve the case on rule interpretation grounds, thereby avoiding a difficult constitutional question under the Confrontation Clause.<sup>77</sup> To accomplish this goal, the Court had to finesse the content and role of the Advisory Committee Note.

Justice Kennedy had another chance to argue for the importance of the Advisory Committee Notes in *Tome v. United States*.<sup>78</sup> In *Tome* the Court interpreted Federal Rule of Evidence 801(d)(1)(B), which allows for the admission of a prior consistent statement if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination" and if the statement is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."<sup>79</sup> The precise question in *Tome* was whether, as under the common law, the statement had to have been made before the "improper influence or motive" arose.<sup>80</sup>

*Tome* was charged with sexually abusing his four-year-old daughter.<sup>81</sup> Because the case arose on the Navajo Indian Reservation, it

74. See Cleary, *supra* note 3, at 913.

75. *Williamson*, 114 S. Ct. at 2436.

76. See Scallen, *supra* note 3.

77. See *Williamson*, 114 S. Ct. at 2435.

78. 115 S. Ct. 696 (1995).

79. FED. R. EVID. 801(d)(1)(B).

80. *Tome*, 115 S. Ct. at 699 (quoting FED. R. EVID. 801(d)(1)(B)).

81. *Id.*

was tried in federal court.<sup>82</sup> The prosecution asserted that Tome, who was divorced from the child's mother and had primary physical custody of the child, sexually abused the child and that the child disclosed the abuse to her mother while they were on vacation.<sup>83</sup> The defense's theory was that the allegations were fabricated so that the mother, who had unsuccessfully petitioned for primary custody of the child, would not have to return the child to her father.<sup>84</sup>

At trial, the child, now six and a half years old, grew increasingly reticent in answering questions.<sup>85</sup> After she testified the prosecution introduced seven different statements describing the sexual abuse that the child made to various witnesses.<sup>86</sup> The trial court admitted the statements despite the defendant's objection, finding that the statements rebutted the defense's assertion that the statements were fabricated so that the child could stay with the mother, even though these statements were made after the alleged motive to fabricate them arose.<sup>87</sup>

The Tenth Circuit Court of Appeals affirmed, stating that the " 'pre-motive requirement is a function of the relevancy rules, not the hearsay rules.' "<sup>88</sup> The court held that " 'the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie.' "<sup>89</sup> A five to four majority of the United States Supreme Court rejected the Tenth Circuit's balancing approach, holding that Rule 801(d)(1)(B) incorporates the common-law requirement that the statement be made before the motive to fabricate arose.<sup>90</sup>

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 700. The trial court also admitted one of the statements, made to a babysitter, under the residual exception, Rule 803(24), and statements to two doctors under the exception for statements made for the purpose of medical diagnosis or treatment, Rule 803(4). *Id.* The Court noted that the prosecution had offered the statements of a social worker under both Rules 803(24) and 801(d)(1)(B), but the trial court did not make clear on which ground it was admitting the statement. *Id.*

88. *Id.* (quoting *United States v. Tome*, 3 F.3d 342, 350 (10th Cir. 1993), *rev'd*, 115 S. Ct. 696 (1995)).

89. *Id.* (quoting *United States v. Tome*, 3 F.3d 342, 350 (10th Cir. 1993), *rev'd*, 115 S. Ct. 696 (1995)).

90. *Id.* at 702.

Justice Kennedy wrote the opinion for the Court.<sup>91</sup> He began by noting the long existence of the common-law “pre motive” requirement, and its endorsement by the leading common law commentators, McCormick and Wigmore.<sup>92</sup> He then turned to the text of the rule itself and found that:

The language of the Rule, in its concentration on rebutting charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in its use of wording which follows the language of the common-law cases, suggests that it was intended to carry over the common-law pre-motive rule.<sup>93</sup>

In this part of his argument, Justice Kennedy’s opinion resembles that of Justice O’Connor in *Williamson*.<sup>94</sup> Both Justices try to argue that the text embodies a policy,<sup>95</sup> yet, it would be more direct to admit that the text truly does not answer the question, and that the Court needed to look elsewhere for guidance in applying the rule.

But where Justice O’Connor stops with the text, Justice Kennedy continues to build on his argument. In a part of the opinion joined only by Justices Stevens, Souter, and Ginsburg, Justice Kennedy turned to the Advisory Committee Note on Rule 801(d)(1)(B) to support his conclusion that the Rule embodies the common-law pre-motive requirement.<sup>96</sup> He emphasized that where “ ‘Congress did not amend the Advisory Committee’s draft in any way . . . the Committee’s commentary is particularly relevant in determining the meaning of the document Congress enacted.’ ”<sup>97</sup> Justice Kennedy also stressed the distinguished credentials of the Committee and that it had “consulted and considered the views, criticisms, and suggestions of the academic community in preparing the Notes.”<sup>98</sup>

Justice Kennedy pointed out that the Advisory Committee drew heavily upon the common law as portrayed in the work of Wigmore and McCormick, and when drafting a rule that was a significant departure from the common law, “in general the Committee said so.”<sup>99</sup> He

91. *Id.* at 698.

92. *Id.* at 700.

93. *Id.* at 702.

94. See *Williamson v. United States*, 114 S. Ct. 2431, 2434-36 (1994).

95. *Id.* at 2435.

96. *Tome*, 115 S. Ct. at 702-04.

97. *Id.* at 702 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165-66 n.9 (1988)).

98. *Id.*

99. *Id.*

illustrated this with several examples where the Committee had rejected the common-law approach and stated that the Notes for Rule 801(d)(1)(B) contain no indication that the Committee intended to depart from the common-law premitive requirement.<sup>100</sup> Justice Kennedy interpreted this silence as indicative of intent to incorporate that requirement because "it is difficult to imagine that the drafters, who noted the new substantive use of prior consistent statements, would have remained silent if they intended to modify the premitive requirement."<sup>101</sup>

Justice Kennedy supported this argument by looking to the Advisory Committee's general approach in structuring Rule 801(d)(1), the rule dealing with prior statements.<sup>102</sup> He pointed to the Committee's rejection of Uniform Rule of Evidence 63(1), which would have allowed the introduction of any out-of-court statement by a declarant who testifies at the trial, subject to the other rules of evidence.<sup>103</sup> Justice Kennedy argued that if the Tenth Circuit's balancing approach was adopted in lieu of the premitive requirement, the distinction between 801(d)(1)(B) and Uniform Rule of Evidence 63(1) would disappear, for any witness's damaging testimony could be met by an allegation that the witness was fabricating, opening "the floodgates to any prior consistent statement that satisfied Rule 403."<sup>104</sup> Justice Kennedy concluded this section of the opinion by establishing a presumption that "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change."<sup>105</sup>

In the next section of the opinion, which was joined by Justice Scalia, Justice Kennedy rejected the government's attempt to rely on academic commentators who were critical of the limits on the use of prior statements when the declarant testified at trial.<sup>106</sup> These commentators suggested that courts move toward a balancing approach for determining the admissibility of prior statements.<sup>107</sup> The Court re-

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100. *Id.* at 702-03.

101. *Id.* at 703.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 704 (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989)).

106. *Id.* at 704-05.

107. *Id.* at 704 (citing Mason Ladd, *The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof*, 18 MINN. L. REV. 506 (1934); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192-96 (1948); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 344-45 (1961)).



jected this argument in large part because the Advisory Committee also rejected it:

The statement-by-statement balancing approach advocated by the Government and adopted by the Tenth Circuit creates the precise dangers the Advisory Committee noted and sought to avoid: It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted.<sup>108</sup>

Justice Kennedy concluded his argument by acknowledging the potential difficulty of applying the pre motive requirement, but stressed that "as the Advisory Committee commented," it was less of a burden and more predictable than the balancing approach suggested by the government and the Tenth Circuit.<sup>109</sup>

Justice Scalia filed an opinion concurring in the judgment and joining most of Justice Kennedy's opinion.<sup>110</sup> He refused, however, to join the part of the opinion "devoted entirely to a discussion of the Advisory Committee's Notes" and which "gives effect to those Notes not only because they are 'a respected source of scholarly commentary,' . . . but also because they display the 'purpose' or 'inten[t]' of the draftsmen."<sup>111</sup> Justice Scalia allowed the references to purpose and intent to distract him, and unreasonably heaped abuse upon those who rely on the Advisory Committee Notes. While he confessed that he had committed the sin of acquiescing in or relying on the Notes, he begged for forgiveness from the gods of interpretation: "More mature consideration has persuaded me that is wrong."<sup>112</sup> He reiterated his objections to legislative history in general,<sup>113</sup> and, while he noted that "the Notes are assuredly persuasive scholarly commentaries—ordinarily *the* most persuasive—concerning the meaning of the Rules,"<sup>114</sup> to him they have no authority.

108. *Id.* at 704-05.

109. *Id.* at 705. Kennedy also sympathized with the problems of proof in child abuse cases, but noted that while the evidence rules cannot be altered for any class of cases, the statements might be admissible under another hearsay exception, such as Rule 803(24). *Id.*

110. *Id.* at 706 (Scalia, J., concurring in part and concurring in judgment).

111. *Id.* (Scalia, J., concurring in part and concurring in judgment) (citations omitted).

112. *Id.* (Scalia, J., concurring in part and concurring in judgment).

113. *Id.* (Scalia, J., concurring in part and concurring in judgment).

114. *Id.* (Scalia, J., concurring in part and concurring in judgment).

The dichotomy of “persuasive” versus “authoritative” texts is a favorite of Justice Scalia.<sup>115</sup> However, it simply makes no sense. The dichotomy endows authoritative texts with a magical force not seen since the days of legal formalism. The problem courts face here is that the meaning of specific rules of evidence, acknowledged to be the authority—in the sense of the controlling principle of law—is unclear. If the power of the rule to resolve the dispute at hand was clear, the dispute would never have reached the Court. The only issue is which of the competing alternative interpretations is the most persuasive or “sound” construction. Justice Scalia begged the question by declaring the text of the Rules authoritative and all other sources “merely” persuasive.

In addition, Justice Scalia ignored the special quality of the rule-making process, in which the Court and its agents have a unique role. He drew strange analogies:

[The Notes] bear no special authoritativeness as the work of the draftsmen, any more than the views of Alexander Hamilton (a draftsman) bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution. It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change. In my view even the adopting Justices’ thoughts, unpromulgated as Rules, have no authoritative (as opposed to persuasive) effect, any more than their thoughts regarding an opinion (reflected in exchanges of memoranda before the opinion issues) authoritatively demonstrate the meaning of that opinion. And the same for the thoughts of congressional draftsmen who prepare statutory amendments to the Rules.<sup>116</sup>

These analogies just do not work. First, Justice Scalia obscured the issue by focusing on the “authoritativeness” of secondary sources. One can concede that the individual views of draftsmen on the meaning of the Constitution are not binding on a court, yet still argue that Hamilton’s views are more persuasive, more thoughtful, or “weightier” than Jefferson’s in light of Hamilton’s experience in drafting the language. Second, even if Jefferson’s views on the meaning on the

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115. *See, e.g.*, *Hirschey v. Federal Energy Regulatory Comm’n*, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) (referring to “the authoritative, as opposed to the persuasive, weight of the [House Committee] Report”).

116. *Tome*, 115 S. Ct. at 706 (Scalia, J., concurring in part and concurring in judgment) (citation omitted).

Constitution have the same “persuasive” weight as Hamilton’s, to compare the process of drafting the Constitution to the rule-making process ignores the Rules Enabling Act’s allocation of power between Congress and the Court—including the Court’s agents. The rule-making process is now an ongoing joint venture between the Court and the Congress. The Advisory Committee play a vital role in negotiating the needs of the adversary system and the concerns of Congress.<sup>117</sup> Finally, the analogy to the Court’s preliminary thoughts expressed in memoranda is inapposite, for while the Court’s preliminary memos are never intended for public consumption, the Advisory Committee Notes are expressly intended for that purpose.<sup>118</sup>

Justice Scalia’s argument approached absurdity when he tried to extend the problem of the naive or lazy legislator to his colleagues: “[T]here is no certainty that either we or [Congress] read those thoughts, nor is there any procedure by which we formally endorse or disclaim them.”<sup>119</sup> While nothing is certain, as the saying goes, I find it highly improbable that United States Supreme Court Justices would transmit proposed rules of practice and procedure to Congress without reading both the rules and their accompanying commentary. Moreover, there certainly is a means of disapproving both the Notes and the proposed rules themselves. When the Chief Justice transmits the rules to Congress, it is with an explanatory letter that can even contain dissenting views.<sup>120</sup> Justice Scalia himself has made use of this to make his opinions very clear.<sup>121</sup>

In *Tome*, Justice Scalia refused to acknowledge the “authority” of the Advisory Committee Note to Rule 801(d)(1)(B), although he recognized its “persuasive” value.<sup>122</sup> His distinction added nothing to our understanding of the real problem—what weight to give the Advi-

117. A majority of the Advisory Committee on Evidence was opposed to proposed Rules 413-415 on the grounds that the concerns of Congress embodied in those rules are already dealt with by the Federal Rules of Evidence and that the proposed rules raise significant dangers of undue prejudice and constitutional problems. REPORT OF THE JUDICIAL CONFERENCE, *supra* note 65. However, the Advisory Committee recognized that it did not have the power to reverse the policy decisions made by Congress, so it simply redrafted the proposed rules in order to make them more consistent with the other federal rules and to minimize constitutional infirmities. *Id.* This treatment of a controversial situation illustrates the Advisory Committee’s respect and concern for both the adversary system and the role of Congress in promulgating rules.

118. See Baker, *supra* note 36, at 329; Cleary, *supra* note 3, at 913-14.

119. *Tome*, 115 S. Ct. at 706 (Scalia, J., concurring in part and concurring in judgment).

120. See *supra* note 44 (discussing transmittal of proposed Rule 412).

121. See, e.g., *Amendments to the Federal Rules of Civil Procedure*, 40 U.S.L.W. 4365, 4392 (Apr. 22, 1993) (Scalia, J., dissenting).

122. *Tome*, 115 S. Ct. at 706 (Scalia, J., concurring in part and concurring in judgment).

sory Committee Notes when the text of the rule does not resolve the issue at hand. Moreover, while he disparaged the Advisory Committee note as “authoritative” evidence of the “intent” of the drafters or the “purpose” of the rule, he was also willing to look to the common-law cases—another secondary source—for evidence of the meaning of the rule without explaining the relative weight of these secondary sources.<sup>123</sup>

I have argued for an approach to interpretation of evidence rules that is consistent with the forensic context in which these questions arise—the process of practical reasoning.<sup>124</sup> The practical reasoning approach recognizes that, like the process of proof in a courtroom, interpretation is a process of argumentation and persuasion. Under this approach interpretation becomes a genuine process of “construction”: The interpreter uses all of the possible sources of a legal text’s meaning, such as its language, the language of related texts, evidence of the intentions of the drafters of the text, the historical context of the text, previous interpretations of the text, the instrumental aspects of potential interpretations, and the evolution of the language of the text over time to “construct” the meaning of the text in a particular situation.<sup>125</sup>

Additionally, I contend that the Supreme Court’s most “solid” constructions manifest the qualities of candor and completeness, qualities essential to the persuasiveness and the educative function of the Court. A vital part of this process is the consideration and treatment of the evidence of the drafter’s thoughts as to the meaning of the legal text, which in the case of the Federal Rules of Evidence, means the Advisory Committee Notes as well as the more traditional congressional legislative materials—reports of the House Judiciary Committee, the Senate Judiciary Committee, and their conference committees.

## V. CONCLUSION

The Federal Rules of Evidence are special statutes and the approaches to statutory interpretation must be thoughtfully applied to them. The Advisory Committee Notes are special, high-quality legis-

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123. *Id.* (Scalia, J., concurring in part and concurring in judgement). It is not clear whether Justice Scalia was persuaded more by the Advisory Committee Note or the common-law cases, the language of which is “track[ed]” in the rule. *Id.* (Scalia, J., concurring in part and concurring in judgement).

124. Scallen, *supra* note 3.

125. *Id.* (citing Farber & Frickey, *supra* note 14, at 461-65).

lative history. To say they are not binding is to beg the question of what value they have. The rule-making process is long and difficult. It is unreasonable to expect every question about the application of a rule to result in a revision of that rule. Where the text does not solve the problem, but the Notes do help to solve it, the Notes should carry great weight, and the Court should not be shy about respecting the work of its distinguished agents.

At the same time, it would be an abuse of the Advisory Committee Notes to rely on them to the exclusion of other sources of interpretation. To use my own analogy, if Justice Scalia means that the Notes are not direct evidence of the meaning of the Federal Rules of Evidence, I would have to agree. The only direct evidence of the meaning of the Rules is their text. But, as we have seen time and time again, the text of a rule does not always “speak for itself.” The only method of “construing” a rule in such cases is to consider circumstantial evidence of its meaning, which includes the published Advisory Committee Notes. Dean McCormick emphasized that circumstantial evidence can be just as probative as direct evidence; thus, the fact that circumstantial evidence may be only a building block and not the building itself is not a reason to exclude it from consideration.<sup>126</sup> With apologies to Dean McCormick, the Advisory Committee Notes are not just a brick, but rather a part of the foundation of the wall of evidence, and ought to be regarded as such.<sup>127</sup>

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126. CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 317 (1954) (“[W]hen [a piece of circumstantial evidence] is offered and judged singly and in isolation, as it frequently is, it cannot be expected by itself to furnish conclusive proof of the ultimate fact to be inferred. . . . A brick is not a wall.”).

127. *See id.*